Lew Siew Moi, Datin v Ann Loong Holdings Sdn Bhd & Ors

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HIGH COURT (KUALA LUMPUR) — SUIT NO D2–26–22 OF 1997
ZAINUN ALI J
30 NOVEMBER 2010

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Companies and Corporations — Oppression — Minority shareholders — EGM removing director — Whether conduct amounting to oppression — Whether EGM null, void and of no effect — Whether conduct of majority departure from standards of fair dealing — Companies Act 1965 s 181

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The petitioner owned 2,000 out of 364,000 shares of issued and paid-up capital of the company while the first respondent was the holding company of the family of a stable of companies which were all related companies, owned by the petitioner's family. The petitioner had been the managing director of the company for the past 20 years. On 25 July 1997, an EGM was arranged where, inter alia, the petitioner was thrown out as the director of the parent company. The petitioner contended that she was wrongfully excluded from the management and that the wrongdoers arranged an EGM which was illegal and void. By taking out a petition under s 181 of the Companies Act 1965 ('the Act'), the petitioner alleged that she was oppressed by the respondents. As the minority shareholder, the petitioner sought the reliefs that a declaration declaring the EGM as void and of no effect and that the first respondent company or the other shareholder should buy out her shares at a value determined by the court. The issues before the court were whether there was 'oppression' within the meaning of s 181(1)(a) and (b) of the Act and whether the conduct of the majority was a visible departure from the standards of fair dealing.

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Held, allowing the application:

(1) There was non-compliance with relevant rules and the notice was bad. The purpose of the EGM was to seek removal of a director. Any such EGM required special notice of 28 days under article 60 of the company's article of association and under s 153 of the Act. Even though the notice of the EGM dated 25 June 1997 called for a meeting, there was no evidence that the second respondent had deposited the requisition at the registered office of the company. The contents of the impugned notice did not state that it was asking that the directors of board to arrange a meeting as required by s 144(1) of the Act (see paras 14–16 & 18).

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(2) The petitioner had established that the 'affairs of the company' had been conducted in a manner prejudicial to the interest of the petitioner and

that oppression and undue prejudice under s 181 of the Act was established. Based on the evidence, it was established that the second, third and fourth respondents had conducted the affairs of the company in disregard of the petitioner's interest and other member's interests (see paras 20 & 29).

(3) The resolution removing the petitioner as director at the 25 July 1997 EGM was null void and of no effect. The existing shareholders of the respondent company had to purchase the petitioner's shares at the value set down by an independent auditor within thirty days of the valuation report being lodged into the court (see para 30).

[Bahasa Malaysia summary

Pempetisyen memiliki 2,000 daripada 364,000 saham-saham modal yang diterbitkan dan berbayar syarikat sementara responden pertama adalah syarikat induk keluarga yang mempunyai beberapa syarikat yang mana kesemuanya adalah syarikat-syarikat yang berkait, dimiliki oleh keluarga pempetisyen. Pempetisyen telah menjadi pengarah urusan syarikat untuk selama 20 tahun yang lalu. Pada 25 Julai 1997, EGM diaturkan di mana, antara lain, pempetisyen dibuang daripada menjadi sebagai pengarah syarikat induk. Pempetisyen berhujah bahawa dia dikecualikan secara salah daripada pengurusan dan bahawa orang yang bersalah yang mengatur EGM yang mana adalah haram dan tidak sah. Dengan memohon petisyen di bawah s 181 Akta Syarikat 1965 ('Akta'), pempetisyen mendakwa bahawa dia ditindas oleh responden-responden. Sebagai pemegang saham minoriti, pempetisyen memohon relief bahawa perisytiharan mengisytiharkan EGM adalah tidak sah dan tidak memberi kesan dan bahawa syarikat responden pertama atau pemengang saham lain patut membeli saham dia pada nilai yang ditentukan oleh mahkamah. Isu-isu di hadapan mahkamah adalah sama ada maksud s 181(1)(a) dan (b) Akta sama ada tingkah laku majoriti adalah penyimpangan jelas daripada standard berlaku adil.

Diputuskan, membenarkan permohonan:

(1) Tidak terdapat ketidakpatuhan dengan peraturan-peraturan relevan dan notis adalah tidak betul. Tujuan EGM adalah untuk mendapatkan persetujuan untuk pembuangan pengarah. Apa-apa EGM sedemikian memerlukan notis khas selama 28 hari di bawah artikel 60 artikel persatuan syarikat dan di bawah s 153 Akta. Walaupun notis EGM bertarikh 25 Jun 1997 memanggil untuk mesyuarat, tidak terdapat keterangan bahawa responden kedua telah menyerahkan permohonan di pejabat berdaftar syarikat. Kandungan notis tersebut tidak menyatakan bahawa ia meminta pengarah-pengarah lembaga untuk mengaturkan mesyuarat seperti yang dikehendaki oleh s 144(1) Akta (lihat perenggan 14–16 & 18).

(2) Pempetisyen telah membuktikan bahawa 'affairs of the company' telah dijalankan dengan cara yang memprejudis kepada kepentingan pempetisyen dan bahawa penindasan dan 'undue prejudice' di bawah s 181 Akta dibuktikan. Berdasarkan keterangan, ia dibuktikan bahawa responden-responden kedua, ketiga dan keempat telah menjalankan hal ehwal syarikat tanpa mempedulikan kepentingan pempetisyen dan kepentingan ahli-ahli yang lain (lihat perenggan 20 & 29).

(3) Resolusi untuk membuang pempetisyen sebagai pengarah pada EGM 25 Julai 1997 adalah terbatal dan tidak memberi kesan. Pemegang-pemegang saham yang sedia ada syarikat responden kena membeli saham-saham pempetisyen pada nilai yang ditetapkan oleh auditor bebas dalam masa 30 hari dari tarikh laporan penilaian dimasukkan ke mahkamah (lihat perenggan 30).]

Notes

For cases on minority shareholder, see 3(1) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 647–655.

Cases referred to

Hup Seng Co Ltd v Chin Yin & Ors [1962] MLJ 371 (refd)

Jerry Ngiam Swee Beng v Abdul Rahman bin Mohd Rashid & Anor and other actions [2003] 6 MLJ 448, HC (refd)

Kong Thai Sawmill (Miri) Sdn Bhd, Re [1978] 2 MLJ 227, PC (refd)

Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor [1996] 1 MLJ 113, FC (refd)

Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661, CA (refd)

Legislation referred to

Companies Act 1965 ss 126(2), 144, 144(1), (3), 145, 153, 181, 181(1)(a), (b), (2)(c)

(GK Ganesan Saiful and Rokiah) for the plaintiff.
(Francis Pereira and Shan) for the respondent.

Zainun Ali J:

BROAD GROUNDS

[1] The petitioner, being a minority shareholder of the first respondent, took out this petition against the respondents, under s 181 of the Companies Act 1965.

[2] The petitioner owned 2,000 out of 364,000 shares of issued and paid-up

capital of the company. The first respondent was the holding company of the family of a stable of companies (Ann Loong Industries Sdn Bhd, Sin Hup Hock Agencies, CA Marketing (M) Sdn Bhd etc) which are all related companies, owned by the petitioner's family. It is thus a family business.

[3] The petitioner had, for the past 20 over years, been the managing director of the company, thus enabling her to participate in the management of the family business.

[4] However on 25 July 1997 an EGM was convened whereby, inter alia, the petitioner was thrown out as a director of the parent company.

[5] Having been the managing director of the company for the past 22 years at least, the petitioner took the position that she was wrongfully excluded from management and that the wrongdoers, by convened an EGM which the petitioner considered to be illegal and void. By taking out a petition under s 181 Companies Act, the petitioner is clearly alleging oppression against her by the respondents.

[6] In view of the above, the petitioner sought the following reliefs:

(a) a declaration that the EGM is void and of no effect (s 181(2)(c)); and

(b) that the first respondent company or the other shareholders buy out her shares at a value to be determined by the court.

[7] The petitioner was heard at some length in open court and after hearing the testimony of witnesses, submissions of both parties and having regard to the cause papers, documents and authorities cited, this court is of the view that:

(a) firstly it has to be determined whether there was 'oppression' within the meaning of s 181(1)(a)–(b) of the Companies Act; and

(b) the test commonly applied would be to see whether the conduct of the majority is a visible departure from standards of fair dealing ie whether the conduct was burdensome, harsh and wrongful and includes the event of disregard for interest of members, shareholders or holders of debenture of company (refer to *Re Kong Thai Sawmill (Miri) Sdn Bhd* [1978] 2 MLJ 227) and (*Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996] 1 MLJ 113).

[8] It is this court's view that the convening of the EGM of the company on 25 July 1997 and the removal of the petitioner as director of the company on 25 July 1997 were significant in determining whether there was oppression.

[9] The first question is:

(1) Was the calling of the EGM lawful?

Since the object of the EGM (as can be seen during the trial) was to remove a director, an ordinary resolution under article 107 of article of association was required.

[10] However, s 126(2) of the article which overrides any contrary clause in the articles, requires a written notice. Under ss 144 and 145 of the Companies Act, an EGM can be requisitioned by the directors or by members of the company.

[11] In the present case, it was called by the second respondent who was not at the material time, a director of the company. He was a shareholder holding 120,000 shares or 32.9% of the total issued and paid up share capital.

[12] Article 57 of the companies articles state that the director of the company, shall on the requisition of *members* holding not *less than 10%* of paid up capital, convene (requisition) an EGM.

[13] Under article 58 if within 28 days after deposit of requisition the directors do not proceed to convene the EGM, the requisitioning members may call for the meeting in three months of date of the latter notice (s 144 (3)).

[14] Since the purpose of the EGM was to seek removal of a director, any such EGM required special notice of 28 days under article 60 of the company's article of association and under s 153 of the Companies Act.

[15] In the instant case, the said notice of EGM dated 25 June 1997 called for a meeting, but there seemed to be no evidence that the second respondent had deposited the requisition at the registered office of the company.

[16] In fact the *contents* of the notice (now referred to as the 'impugned notice') did not state that it is asking that the directors of the board to convene a meeting as is required under s 144(1).

[17] In fact, it was a 'notice of EGM', issued by the second respondent who is an ordinary member and who also, did not wait for the passage of the statutory period of 21 days.

[18] It is this court's view therefore that there is non compliance with the relevant rules as mentioned above. The notice was therefore bad, on the authority of authorities such as *Jerry Ngiam Swee Beng v Abdul Rahman bin*

Mohd Rashid & Anor and other actions [2003] 6 MLJ 448 and *Hup Seng Co Ltd v Chin Yin & Ors* [1962] MLJ 371, the impugned notice was not a proper notice and was therefore void.

[19] Corollary to this bad notice is that the petitioner was able to show that following from the convening of a void EGM, the company had, through resolution of the members in the EGM, passed a resolution which unfairly discriminates against one or more member (including petitioner) (s 181 1 (b)).

[20] Thus, taken at its lowest the petitioner had established that the 'affairs of the company' had been conducted in a manner prejudicial to the interest of the petitioner and that oppression and undue prejudice under s 181 is established.

[21] Secondly there is evidence that soon after wresting control of the company's board, the respondents began to strip the first respondent and related companies of their assets, resulting in the dilution and diminution of value of the petitioner's shares.

[22] As regards the petitioner's allegation of being deprived of her legitimate expectation to manage the company the court's view is this.

[23] The petitioner's 'right to manage' arose from her holding shares in the parent company (the first respondent). Though it is known that the petitioner did not actively take part in the management, she did it by proxy and such an arrangement has been considered to be acceptable all these years by members and shareholders, thus she has the right of legitimate expectation.

[24] (See *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661, CA) and other cases where courts have accepted that a breach of such legitimate expectation of members would amount to oppressive conduct which is prejudicial to them.

[25] Other evidence of mismanagement by the respondents which resulted in the squandering of assets of the first respondent and related companies only added to the oppressive nature of the acts of the respondents.

[26] To reiterate, it is evident that the petitioner was removed as a director in an illegally convened EGM after being in the post for 22 years.

[27] In the alternative, her right to manage the family company was a legitimate expectation and this was an implied contract which was breached by the respondent.

[28] A series of mismanagement by the respondents of the first respondent and its related and subsidiary companies have resulted in a breach of fiduciary duties of the respondents (second, third, and fourth).

[29] This court finds that from the evidence before it, it is established that second, third, and fourth respondents had conducted the affairs of the company in disregard of the petitioner's interest and other member's interests.

[30] In view of the above and in view of the catalogue of oppositions and resistance put up by the respondents in terms of attempts by the valuer/auditor at valuation of the shares despite them being orders of court, this court now orders that:

(a) the resolution removing the petitioner as director at the 25 July 1997 EGM be declared *null, void and of no effect*;

(b) the respondents account to the petitioner by *tracing* the first respondent's company and its subsidiaries which have been stripped/dissipated by the second, third and fourth respondents so as to provide the true valuation of the petitioner's shares, to be determined by *an independent investigative auditor*;

(c) that the *existing shareholders of the first respondent company do purchase the petitioner's shares at the value set down by the said independent auditor within 30 days of the valuation report being lodged into court by the said independent auditor*;

(d) that the first respondent's company and or/respondent *jointly and severally pay* for the *costs of valuation* for this latter valuation exercise within 30 days of submission of invoice by the valuer to the respondent or any one of them; and

(e) *that the said independent auditor be at liberty to apply to this court for directions and their fees to are the paid by the respondents*.

Application allowed.

Reported by Ibnu Aswan